IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.2588 OF 2005
IN
FIRST APPEAL ST.NO.11767 OF 2005

Erick Ansulem Mendes & Ors. ...Applicants
vs.
Dr.Surendra N. Bhasale & Anr. ...Respondents

Mr.Jitendra Damani for the Applicants
Mr.A.A.Kumbhakoni i/b Mr.A.V.Jain Associates for Respondents

CORAM: A.S.OKA, J.
DATED: APRIL 7, 2006.

P.C.:

1. Heard learned Counsel for the parties. This Application is for condonation of delay of eight years and 234 days in preferring the First Appeal. The Application is strongly opposed by the learned Counsel for the Respondents.

2. It will be necessary to refer to the relevant facts of the case. The First Appeal takes exception to the order of dismissal of the suit passed by the City Civil Court on 13th August 1996. Immediately, after the order was passed, a Notice of Motion was taken out by the Appellants-Plaintiffs for setting aside the order of dismissal. However, the said Notice of Motion was not entertained and was rejected. An Appeal from Order was preferred for challenging the order passed on Notice of Motion. The said Appeal was admitted on 7th October 1996 by this Court and interim relief was also granted. The Appeal from Order came up for hearing on 28th March 2005. At that time it was found that Notice of Motion was not maintainable. Therefore, the Appeal was disposed of

with liberty to the Applicants to take out appropriate proceedings and interim order which was operating during the pendency of the Appeal was continued for a period of six weeks to enable the applicants to file appropriate proceedings. Accordingly, on 4th May 2005 First Appeal along with this Application for condonation of delay was filed. The contention of the Applicants is that the time which was spent in the proceedings of Notice of Motion and Appeal from Order cannot be counted against the Applicants.

3. The learned Counsel for the Respondents submitted that an objection was raised to the maintainability of the Notice of Motion taken out by the Appellants in the year 1996 itself and that is the reason why the Notice of Motion was rejected. He submitted that instead of challenging the original decree of dismising the suit by preferring a First Appeal, the Applicants challenged the order passed only on Notice of Motion. He therefore submitted that there is gross negligence on the part of the Appellants and inordinate delay of eight years cannot be condoned.

4. I have considered the submissions. After the Notice of Motion was rejected in September 1996 holding that the same was not maintainable, the Applicants received legal advice of challenging the said order by preferring an Appeal from Order. Accordingly, not only an Appeal from Order was filed but it was admitted by this Court and interim relief was

granted. On 28th March 2005 when the Appeal from Order was came up before this Court, it was held that the Notice of Motion taken out by the Appellants was not maintainable and accordingly liberty was granted to take out appropriate proceedings. Hence, the present First Appeal was filed.

5. In view of this factual position, liberal approach will have to be adopted and delay in preferring the First Appeal will have to be condoned. However, the Respondents are the sufferers and therefore they will have to be compensated by passing the order of costs.

6. Hence, I pass the following order :

i) Rule is made absolute in terms of prayer clause (a) subject to the Applicants paying costs of Rs.10,000/- to the Respondents.

ii) Today a pay order in the sum of Rs.10,000/- drawn in favour of the Respondent No.1 is handed over by the Advocate for the Applicants to the Advocate for the Respondent No.1.

. Therefore, compliance has been made with the order of costs. Hence, office will assign appropriate date for hearing as to admission of the Appeal.

iii) Ad-interim order passed earlier is continued for a

period of three weeks from today.

Judge.